DIANE B. KATZ

IBLA 80-73, 80-78 Decided May 30, 1980

Appeal from decisions of the Utah State Office, Bureau of Land Management, rejecting oil and gas lease offers, U-44041 and U-44132-44138

Affirmed.

1. Patents of Public Lands: Reservations -- Railroad Grant Lands

   Language excluding mineral lands which was included in a patent of railroad grant lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon later discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

2. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Lands Subject to -- Railroad Grant Lands

   A noncompetitive oil and gas lease offer for lands patented under a railroad land grant must be rejected because the United States does not own the mineral deposits in the lands.

APPEARANCES: Diane B. Katz, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Diane B. Katz has appealed two decisions of the Utah State Office, Bureau of Land Management (BLM), dated October 12 and 16, 1979, rejecting noncompetitive oil and gas lease offers, U-44041, and

contain mineral reserves, a railroad company requested that the Secretary of the Interior eliminate the excepting language from its patents. The Secretary reviewed pertinent decisions of the Supreme Court and concluded that the issuance of a patent under the Railroad Land Grant Acts is determinative of the nonmineral character of the lands for the purposes o the grant. Northern Pacific Railway Co., 32 L. D. 342, 344 (1903). The Secretary concluded with a directive to the General Land Office to exclud the excepting language from future railroad land grant patents.

The Supreme Court subsequently reviewed the same issue in Burke v. Southern Pacific R.R. Co., 234 U.S. 669 (1914). The Court concluded that the General Land Office was without authority to issue patents with language excepting mineral lands because the granting Act contemplated th only nonmineral lands would be patented and that the patents would unconditionally pass title.

In summary, once patents issued, the railroad company held full and complete title to the lands. The minerals were not reserved to the Unite States because mineral lands could not be included in a railroad grant.

[1, 2] The patent, issued in 1916, which embraced the lands in dispute here, states in relevant part:

> [P]rovision is made for granting to the said company "every alternate section of public land, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved, or other disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," mineral land excluded; * * *. [Emphasis added.]

Under the Supreme Court's ruling in Burke, the phrase "mineral land excluded" is not effective to condition or diminish the land estate veste in the railway company by issuance of the patent because inclusion of the phrase was beyond the authority of the Land Office. The exclusion is voi the United States made no mineral reservation and has no interest in minerals later discovered on the land. Therefore, offers to the United States to lease the lands for oil and gas must be rejected. Patricia T. Zebal, 65 I.D. 293 (1958); Sewell Thomas, A-27016, A-27106, A-27113 (December 22, 1954).

In her statement of reasons, appellant cites United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957), as support for her contention that the United States owns the mineral estate to the lands at issue. Appellant in Patricia T. Zebal, supra, made a similar argument. The Supreme Court decision as the Solicitor noted in Zebal,

offers U-44132 to 44138, inclusive. Both decisions stated that "[t]he oi and gas interest is not owned by the United States."

The lands encompassed by appellant's offers were patented to the Central Pacific Railway Company on March 25, 1916, by authority of the Ac of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, and the Act of July 3, 1866, 14 Stat. 79. In her statement of reasons, appellant argues that the mineral resources of these lands ha been reserved to the United States.

Section 2 of the Act of July 1, 1862, as amended, supra, gave the predecessor of the Central Pacific Railway Company a right-of-way to construct a railroad from Ogden, Utah, to Sacramento, California. To aid in the construction of the railroad, section 3 granted to the Company

> every alternate section of public land, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of 20 miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: Provided, That all mineral lands shall be excepted from the operation of this act; * * *. [Emphasis added.]

Under section 4, patents conveying title to these lands would issue as th railroad line was completed. The term "mineral land" was defined in section 4 of the Act of July 2, 1864, supra, as not including coal and ir land. It also stated again that lands granted did not include mineral lands.

The mineral lands exception was the subject of a number of early Supreme Court and Departmental decisions.

In Central Pacific R. R. Co. v. Valentine, 11 L.D. 238 (1890), Secretary Noble ruled that discovery of the mineral character of land at any time prior to the issuance of the patent for it requires exclusion of the land from any railroad grant which contains a provision excepting all mineral lands. This was in contrast to determining the status of the lar for other purposes on the date that the route of the railroad line was definitely fixed. This construction was upheld in Barden v. Northern Pacific Railroad Co., 154 U.S. 288, 329-32 (1894).

Until 1903, patents issued under the Railroad Grant Acts in most instances contained language excepting mineral lands. Since this languag might have been construed as allowing the Federal Government to reclaim lands for which patent had issued if they later were found to

involved the question of whether a right-of-way grant to the railroad und section 2 of the Act of July 1, 1862, as amended, supra, carried with it right to underlying minerals. The Court held that the United States retained the minerals in right-of-way lands stressing the distinction between section 3 land grants and section 2 right-of-way grants. Appella here has failed to recognize this distinction.

Appellant also urges that the "railroad right-of-way" was abandoned i 1942 and that the Act of March 8, 1922, 43 U.S.C. § 912 (1976), provides for disposition of public lands in abandoned railroad grants with a reservation of minerals to the United States. This Act is also not helpf to appellant. By its terms, it covers only public lands granted "for use as a right of way for its railroad or as sites for railroad structures of any kind." Once again appellant has confused the grant of the right-of-w and appurtenant structures under section 2, and the grant of alternate sections of land under section 3. The Act of March 8, 1922, supra, is simply not applicable to the lands for which oil and gas leases are sough

Finally, with respect to oil and gas lease offer U-44041, appellant also notes that asphalt deposits were known to exist in the vicinity of t lands which are the subject of that offer in the early 1900's. The responsibility for ensuring that only nonmineral lands were patented rest with the General Land Office. It was recognized early that the land offi may not always make the proper characterization of lands involved in railroad grants. In Barden v. Northern Pacific Railroad, supra at 330, t Supreme Court noted:

> It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. * * * The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

Discussing the same issue in Burke v. Southern Pacific R.R. Co., supra at 692, the Court held that

> a bill in equity, on the part of the Government, [may] lie to annul the patent and regain title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill * * *; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it.

Appellant has no such interest.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

_____
James L. Burski
Administrative Judge

We concur:

_____
Douglas E. Henriques
Administrative Judge

_____
Edward W. Stuebing
Administrative Judge